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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1941

No. ██████████ 90

RODEN COAL COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS AND BRIEF IN SUPPORT
THEREOF.

JOHN JAY McKELVEY,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1240

RODEN COAL COMPANY, INC.,

vs.

Petitioner,

THE UNITED STATES.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS.**

To the Honorable the Supreme Court of the United States:

The Roden Coal Company prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above-entitled cause in the Office of the Clerk of the Court of Claims on the first day of December, 1941, dismissing the plaintiff's and intervenor's petition, and the order overruling the plaintiff's and intervenor's motions for a new trial entered on the second day of February, 1942.

Opinions.

The opinion of the Court of Claims by Littleton, J., will be found at page 14 of the record. The Special Findings of Fact will be found at page 9 of the record, and the conclusions of law at page 13 of the record.

Statement.

1. The action was begun by the Roden Coal Company as claimant by the filing of its petition in the Court of Claims on November 18, 1938.

2. A general traverse in answer to the petition of the claimant was filed by the Attorney General on behalf of the United States on December 28, 1938.

3. Thereafter Hon. Ewart W. Hobbs, Commissioner, duly designated by the Court of Claims for the purpose, took the testimony submitted by the respective parties, and filed his report with his findings of fact on December 7, 1940.

4. An intervening petition was filed on behalf of a mortgagee on October 11, 1941, to which intervening petition a general traverse was filed by the Attorney General on behalf of the United States on October 16, 1941, and an answer to said intervening petition was filed by the claimant October 31, 1941.

5. Thereafter the issues came on for trial before the Court of Claims of the United States and were argued on April 9, 1941, submitted on merits by the respective parties, and briefs filed.

6. On December 1, 1941, Special Findings of Fact, Conclusions of Law, and the Opinion of the Court of Claims of the United States by Littleton, J., were filed and will be found at page 9 of the record. Thereafter judgment was entered dismissing the plaintiff's and intervenor's petitions on December 1, 1941.

7. On January 16, 1942, the plaintiff filed a motion for a new trial and on January 20, 1942, intervenor filed a similar motion; on February 2, 1942, the court entered an order

overruling the plaintiff's and intervenor's motions for a new trial.

8. The plaintiff, a New York corporation, for many years has operated a fully equipped coal yard on land adjacent to the artificial canal known as the Dyckman's Meadows cut-off, which formed a part of the project for the improvement of the Harlem River. The waterfront line of the coal yard is the southerly boundary line of the strip of upland, 350 feet in width, taken in condemnation proceedings by the United States for the said Dyckman's Meadows cut-off.

Within this strip of upland, a channel of 150 feet in width and 15 feet in depth was constructed, and has been maintained for a varying width at said depth, with a depth of 10 to 11 feet at the bulkhead line along the coal yard.

By the year 1937, it was apparent from previous experience, that dredging close to plaintiff's bulkhead would place the coal yard in danger of subsidence. On November 1, 1937, the Government commenced dredging operations close to plaintiff's bulkhead. On that day, plaintiff's president, prior to the dredging, notified the Government engineer that he was fearful the dredging would damage the Company's coal yard. Despite the warning, dredging was continued till November 3, when the Government engineer, noting cracks opening on plaintiff's land, removed the dredge farther out and later discontinued the dredging.

The dredging caused a subsidence of plaintiff's coal yard, disintegration of the bulkhead and sliding of the same with the land back of it into the canal to such an extent as materially to damage the coal yard and make useless a substantial part thereof, and leaving a substantial area of the coal yard permanently flooded.

The fair market value of the plaintiff's coal yard before the loss and damage was \$204,809.00, and thereafter was \$115,647.00, a decrease of \$89,162.00.

Statutes.

New York State Laws, Chapter 929 of 1937, known as the Administrative Code. Article 9, Sub-article 2. Section C26-384.0.

“Excavations affecting adjoining property.—a—Temporary support of adjoining property. Any person causing any excavation to be made shall provide such sheet piling and bracing as may be necessary to prevent the earth of adjoining property from caving in before permanent supports have been provided for the sides of such excavation.—b—Permanent support of adjoining property. Whenever provisions are lacking for the permanent support of the sides of an excavation in accordance with the provisions of Section C26-563.0, a person causing such excavation to be made shall build a retaining wall at his own expense and on his own land. Such retaining wall shall be carried to a height sufficient to retain the adjoining earth, shall be properly coped and shall be provided with a substantial guard rail or fence four feet high.”

Section C26-385.0.

“Excavations affecting adjoining structures.—a—Excavations more than ten feet deep.—Whenever an excavation is carried to a depth of more than ten feet below the curb, the person who causes such excavation to be made shall, if afforded the license necessary to enter the adjoining premises, at all times and at his own expense preserve and protect from injury any structure the safety of which may be affected by such part of the excavation as extends more than ten feet below the curb, and such person shall support the adjoining structure by proper foundations, whether or not such structure is more than ten feet below the curb.

Questions Presented.

The question presented here is whether the Court of Claims of the United States has denied to the plaintiff

herein due process of law and has deprived the plaintiff of private property for public use without just compensation in violation of the 5th Amendment to the Federal Constitution:

(1) In refusing to award to the plaintiff the just compensation for real property taken by the United States in the course of dredging operations conducted by the War Department in the Harlem Ship Canal under Congressional Authority, which caused the permanent flooding of the petitioner's property.

(2) In holding that a permanent flooding of an owner's land by causing its subsidence to a level which permits it to be flooded by the waters of an adjoining canal is not a taking within the same doctrine which holds that a raising of the natural level of waters so as to flood adjoining land is a taking.

(3) In holding that the United States, in acquiring by condemnation a strip of land described by metes and bounds for an artificial canal, also acquired rights adjacent to the actual dimensions of said strip which might be affected by the construction of the canal, *though there is no such finding of fact*, and therefore holding that the United States is free from liability for permanently flooding plaintiff's land.

Reasons for Granting This Petition.

I.—That your petitioner, by the acts of the United States, has had its coal yard destroyed and permanently flooded to an extent which renders it useless, and is left without remedy, unless it may recover the just compensation to which it is entitled, on the ground that its property has been taken by the United States under right of eminent domain.

II.—That the record, a certified copy of which is presented herewith, shows that the Special Findings of Fact were disregarded in the conclusion of law arrived at.

(1) The said conclusion of law is based upon an assumption of fact not found in the Special Findings of Fact, but stated in the court's opinion; to wit: that the acquisition of the property for the ship canal included:

“Any rights adjacent to the actual dimensions of the navigable channel that might be affected by construction of the navigable waterway.”

An examination of the Special Findings of Fact reveals nothing which justifies this statement. Special Finding of Fact No. 3 states that:

“The *land* was secured free of cost to the United States and preliminary work was undertaken on the cut through Dyckman's Meadows.”

and, referring to the Roden Coal Company yard:

“Its waterfront, the line established by the Secretary of War October 18, 1920 was also the *boundary of land* that had been taken in Condemnation Proceedings in 1886 for the use of the United States in creating the Dyckman's Meadows cut-off.” (Italics ours.)

(2) The implication from the manner in which the words “*land*” and “*boundary of land*” are used negatives the idea that any rights were acquired adjacent to the boundary lines of the canal strip.

(3) Except for the implication above mentioned, it is clear that, in so far as the condemnation proceedings are concerned, the Special Findings of Fact are silent with respect to the acquisition of any rights outside of the boundary lines.

The condemnation maps, the petition, and judgment were introduced in evidence. (Plaintiff's Exhibits Nos. 9 and 10.) Reference to them is all that would be required to remove any possible doubt. The matter is vital to the contention of the claimant.

Justice requires that the facts should be definitely found with respect thereto, and the case should be remanded for that purpose.

Luckenbach S. S. Co. v. U. S., 272 U. S. 533.

III.—That the Special Findings of Fact are contradictory.

(1) Special Finding of Fact No. 5 states:

“By the year 1937 *it was apparent* that dredging close to plaintiff's bulkhead would place the coal yard in danger of subsidence through failure of the bulkhead piling to hold.”

Special Finding of Fact No. 9 states that the Government had no

“Intention to disturb the bulkhead or natural elevation or grade of plaintiff's land, *or any reason to suppose that such a result would follow.*” (Italics ours.)

Here are two findings which are obviously contradictory, for if the result was apparent, it cannot be said there was no “reason to suppose such a result would follow.”

(2) Special Finding of Fact No. 9 states:

“Neither the United States nor any of its agents in fact used, occupied, invaded, or encroached upon plaintiff's land or upon any part thereof *during dredging operations or at any time thereafter.*” (Italics ours.)

Special Finding of Fact No. 6 definitely states:

“The dredging of November, 1937, did in fact cause a subsidence of plaintiff's coal yard and disintegration of the wooden part of the bulkhead to such an ex-

tent as to materially damage the coal yard and make useless a substantial part thereof * * * and when the subsidence had taken place, exposing a substantial part of the coal yard to flooding and high tides."

If the statement in Finding No. 6 is true, then the statement in Finding No. 9 can not be true. Occupation, invasion, and encroachment do not imply *physical* presence of the active party; if the acts of such party result in subsidence, disintegration, destruction and flooding, there is, in fact, as well as in law, *invasion and encroachment*.

Because of the ambiguity and contradiction in the special findings of fact as above set forth, the case should be remanded in accordance with the principle laid down by the United States Supreme Court that "where the findings are ambiguous, contradictory, or silent in respect of a material matter, or appear on their face ill-found in point of law, the case may and should be remanded for corrected or additional findings." (*Luckenbach S. S. Co. v. U. S.*, 272 U. S. 533, 539.)

IV. That if allowed to stand, this decision will work extreme hardship and injustice to the petitioner who, through no fault of its own, suddenly and without warning has lost the use of its coal yard and been deprived of its principal means of carrying on its business, and has thereby suffered financial ruin.

In the language of Judge Miller (*Pumpelly v. Green Bay Lumber Co.*, 13 Wall. 166, 177):

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law * * * it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect, subject it to total destruction without making any compensation, because, in the

narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

V. That this case, perhaps for the first time, presents the question of whether or not a permanent flooding of an owner's land, by the acts of the United States in carrying on a public project, by undermining it, taking away its natural support and causing a subsidence which permits it to be permanently flooded by the *natural level* of adjacent public waters is within the well established principle that a permanent flooding of private lands by *raising* the level of the adjacent waters is a taking for which the owner is entitled to the just compensation guaranteed by the Fifth Amendment to the Constitution.

VI. Your petitioner respectfully submits that, by the decision of the Court of Claims of the United States, it has been deprived of just compensation for private property taken for public use, and that it is without remedy unless this Court shall review the decision of the State Court and apply the proper rule of law.

Wherefore, your petitioner prays that this petition for a writ of certiorari to review the judgment of the Court of Claims of the United States be granted.

JOHN JAY MCKELVEY,
Attorney and Counsel for Petitioner.

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

The facts with respect to the successive steps in the action are sufficiently set forth in the petition for the writ in support of which this brief is submitted, and need not be repeated here.

Opinion.

The Opinion of the Court of Claims of the United States (R. 14) is not reported.

Jurisdiction.

The final judgment of the Court of Claims of the United States was entered December 1, 1941. Jurisdiction of this Court is invoked under Section 240 of the Judicial Code, 3(b) as amended by the Act of February 13, 1925.

Statement.

A brief resume of the facts, none of which are disputed, is as follows:

The plaintiff is a New York corporation, and for many years has operated a fully equipped coal yard on land adjacent to the artificial ship canal known as the Dyckman's Meadows cut-off, which formed a part of the project for the improvement of the Harlem River (R. 10, Sp. F. 3).

Coal was received by barge at the waterfront, and retailed from the yard to the customers by truck (R. 9, Sp. F. 2).

The waterfront line of the coal yard is the southerly boundary line of the strip of upland, 350 feet in width, taken in condemnation proceedings by the United States for the said Dyckman's Meadows cut-off (R. 10, Sp. F. 3). The taking was confined to the strip of land, and did not include rights or easements outside of the boundaries specified.

Within this strip of upland, a channel of 150 feet in width and 15 feet in depth was constructed, and since 1907 has been maintained for a varying width at a minimum depth of 15 feet, and a depth of 10 to 11 feet was provided at the bulkhead line along the coal yard, sufficient to accommodate the coal barges (R. 10, Sp. F. 3).

Following earlier dredgings, the Government dredged the waterway in the general vicinity of the Roden Coal Company's yard in 1926 and again in 1929 (R. 11, Sp. F. 4). There had been some settlement of the plaintiff's property following the dredging operations of 1926, but not of a serious nature. A settlement followed the dredging of 1929-30, which made necessary certain minor repair work (R. 12, Sp. F. 5), and plaintiff, under a permit of the government, also placed new steel sheet piling to a depth specified by the government, along the face of a section of the bulkhead, which encroached slightly beyond the boundary line of the plaintiff's property (R. 11, Sp. F. 4).

By the year 1937, it was apparent from previous experience that dredging close to plaintiff's bulkhead would place the coal yard in danger of subsidence through failure of the bulkhead to hold (R. 12, Sp. F. 5).

On November 1, 1937, the Government commenced dredging operations close to plaintiff's bulkhead. On that day, plaintiff's president, prior to the commencement of such dredging, communicated with the Government engineer, stating that he was fearful that the dredging would damage the Company's coal yard. On the morning of November 3, the Government engineer examined the site, found that cracks on plaintiff's land were opening up, and he removed the dredge from alongside the bulkhead where it had been operating to a position in midstream, and when it appeared later that settlement of the plaintiff's property

was continuing and the bulkhead was being forced channel-ward, the dredging operations in the vicinity were discontinued (R. 11, Sp. F. 4).

The dredging of November, 1937, did in fact cause a subsidence of plaintiff's coal yard and disintegration of the wooden portion of the bulkhead and cribbing back of the bulkhead to such an extent as materially to damage the coal yard and make useless a substantial part thereof. The bulkhead was of insufficient depth to withstand the dredging to the fifteen foot point and the consequent loss of material at its base, and the major part, with the land behind it, slid into the canal, leaving a substantial area of the coal yard permanently flooded and subject to erosion by the tides (R. 12, Sp. F. 6).

The fair market value of the plaintiff's coal yard before the loss and damage was \$204,809.00, and thereafter the value of the area remaining, less the area rendered useless by the permanent flooding was \$115,647.00, a decrease in fair market value of \$89,162.00 (R. 13, Sp. F. 8).

Errors Urged.

The Court of Claims erred

(1) In refusing to award the just compensation for real property destroyed and damaged by the United States in the course of dredging operations which caused the permanent flooding of plaintiff's property.

(2) In holding that a permanent flooding of plaintiff's land caused by dredging in an adjoining artificial canal, a consequent subsidence and sliding into the canal of the plaintiff's land and structures, and the overflow of the waters of the canal, is not a taking.

(3) In holding that the United States acquired by condemnation rights of slope or overflow over adjoining lands and that the lands subsequently purchased by plaintiff were subject to such rights.

(4) In holding that the defendant had no liability because it had no intention to disturb the plaintiff's land or any reason to suppose such a result would follow.

(5) In holding that the defendant had no liability because its agents did not physically enter upon or occupy the plaintiff's land.

(6) In entering a judgment in favor of the defendant in the face of findings of fact which were ambiguous and contradictory.

(7) In entering a judgment in favor of the defendant on the assumption that plaintiff's property was subject to rights of the United States to maintain an artificial canal at the authorized depth and width, regardless of damage which might result, when there are no findings of fact to warrant such assumption.

(8) In entering judgment in favor of the defendant upon the theory that it was the plaintiff's responsibility to protect its property by maintaining bulkheads and foundations of sufficient strength and depth to prevent any damage in case of the excavation by the United States of the canal to its full authorized width and depth.

(9) In finding as a conclusion of law that the defendant was not liable upon findings of fact which were ambiguous, contradictory or silent as to facts relied upon as a basis for said conclusion.

ARGUMENT.

Summary of Argument.

I. The extent of the constructive taking.

II. The Government had no marginal rights.

III. The slight encroachment of plaintiff's bulkhead beyond its property line did not affect its rights.

IV. The permanent destruction and flooding of a substantial part of the plaintiff's property by the duly authorized agents of the Government was clearly within the well established doctrine of constructive taking.

V. "Taking" extends to that which is destroyed and is not confined to that which is taken possession of and used.

VI. Plaintiff was under ~~an~~^{no} obligation to protect its property against damage which might result from the acts of the Government in excavating the canal channel to its authorized depth of fifteen (15) feet.

VII. Findings of fact ambiguous, contradictory or silent.

VIII. Conclusion: Judgment should be reversed and case remanded for definite findings or on basis of facts already definitely found, judgment should be entered in favor of the plaintiff.

I.

The Extent of the Constructive Taking.

The undisputed facts clearly establish a case for the application of the principle of constructive taking.

The question is whether, in fairness to the owner, and in view of the fact that a substantial part of the coal yard has been rendered useless because of the washing away of the bulkhead and ground back of the bulkhead, and the overflow of the yard by the waters of the canal, the *entire* coal yard is to be considered as taken, or *only such part* of it as has been made subject to overflow.

If the entire yard is to be considered so damaged as to be unsuitable for continued use as a coal yard, in its present condition, then there has been a constructive taking of the whole, and under the law an implied promise arises to pay for the property an amount which will represent its

fair value immediately before the dredging. This has been found by the Commissioner to be \$204,809.00. (R. 13, Sp. F. 8.)

If, on the other hand, the taking is to be extended only to the portion of the property which has been made subject to overflow, then the recovery by the plaintiff will be limited to the difference in the value of the property before and after the taking. According to the finding of the commissioner, there has been a decrease in value of \$89,162.00. (R. 13, Sp. F. 8.)

There is a third possible treatment of the situation, namely, that the Government has taken only the slope rights necessary to permit of dredging up to the boundary line the full depth. As bearing upon this theory, there is a finding that to restore the use of the surface area of the coal yard as previously used, leaving slope rights for the waters of the canal underneath, the dock, with concrete slab, would cost \$45,044.00. (R. 12, Sp. F. 7.) To this amount it would be necessary to add the reasonable value of the easement of slope, to which the fee would be permanently subject. The criterion for recovery would still be the difference in value resulting from the acts of the Government—\$89,162.00, \$45,000.00 of which would go to construct the dock, which would make use of the restricted fee possible.

II.

The Government Owned No Marginal Rights.

We are not dealing with a natural navigable stream, but with an artificial canal constructed through private property consisting of upland, known at the time of the condemnation suit as Dyckman's Meadows. The canal strip was acquired by right of eminent domain. In the proceeding, no marginal lands and no slope rights were acquired; only the strip described by metes and bounds as shown on

the damage map. No rights in the abutting or adjoining properties ever passed into the ownership of the Government, and therefore, with respect to this artificial canal, it is in the position of a private owner of the fee and can claim no rights or privileges beyond the boundaries. The Government here has no paramount right as it may have in the case of a natural navigable stream, over the area outside of the canal lines, and can do nothing which will damage the adjoining lands without paying just compensation.

In the condemnation proceeding, the property acquired was limited to the strip specifically described in the petition, order of condemnation, commissioner's report, and final decree (Plf's Ex. 9, Sten. M. pp. 36, 37) and shown on the Damage Map (Plf's Ex. 10, Sten. M. pp. 37, 38).

The Damage Map has no indication of any marginal rights or easements being taken, but is confined to the numbered damage parcels described by metes and bounds in the papers above referred to.

For the convenience of the Court, the following excerpts from said exhibit are herewith given.

From the petition:

"Fol. 2. To the Supreme Court of the State of New York: The petition of the United States respectfully shows to this Court: That the United States desires to acquire certain real estate situate in the City and County of New York, and more particularly described in Schedule A hereto annexed as part of this petition in pursuance of an Act of Legislature of the State of New York, etc."

Schedule A set forth the detailed description of the property to be acquired. The westerly part of the southerly boundary of damage parcel 19' is the northerly boundary of plaintiff's land. The entire damage parcel took in a large area extending from the high water line of the Harlem

River on the east, back to Broadway on the west. It is referred to as follows:

"Fol. 13. Description of real estate referred to in the foregoing petition which the United States desires to acquire as stated in said petition, * * *

Fol. 95 to Fol. 107. Parcel No. 19. All that certain piece or parcel of *land or land under water* bounded and described as follows: Beginning at a point on the line of high water in Harlem River at the intersection of said line with the southerly line of the proposed improvement; thence running along said line of improvement, etc. * * * (Here follows *metes and bounds* description) containing sixteen and six hundred and ten one-thousandths (16 and 610/1000) acres. (Italics ours.)

Nowhere in the petition, either in connection with the description or in its general language is there any suggestion or indication that rights outside of the limits of the damage parcel are included in the taking.

The order entered on the 24th day of October, 1879, appoints the Commissioners:

"to ascertain and appraise the compensation to be made to said Isaac M. Dyckman and Fannie B. Dyckman, his wife, according to their several interests in said real estate, they being the owners or persons interested in *that parcel of real estate designated as Parcel No. Nineteen in the petition in the above entitled matter, and particularly described therein.*" (Italics ours.)

In this order there is no indication that any but rights or easements are to be acquired, nor in the report of the Commissioners, dated November 15, 1882, is there reference to any marginal rights. In the report, parcel 19 as described in the petition has been subdivided into 19¹ and 19², 19¹ being the part directly adjacent to the plaintiff's property.

In the final decree, dated July 9, 1886, all of the proceedings from the beginning are recited,—the reports of the Commissioners are affirmed, both as to damages and assessments; the amounts awarded to each owner are stated with a full description of the property for which the awards are made. At Fol. 159 appears the award and description of Parcels 19¹ and 19², the southerly boundary of 19¹ being identical with the northerly boundary of the plaintiff's property. There is no reference anywhere to marginal rights or easements outside of the southerly line of the damage parcel.

III.

As to Encroachment.

The bulkhead, or dock, which had been built under permit and in accordance with the requirements of the Government as prescribed by the War Department, encroached slightly over the fixed southerly boundary line of the canal, which was the established bulkhead line. This was shown in the blue prints annexed to the permit issued by the Government. There is no dispute as to the fact that the construction conformed to the requirements specified in the permit.

If it be argued that, to the extent that the bulkhead encroached on Government lands, it was subject to removal, the answer is that, according to the terms of the permit, certain conditions were specified which were fully complied with by the owner, and the encroachment approved by the Government.

The Government makes no claim that it ever acted under the powers reserved to it by the permit to require the removal of the encroachment. On the contrary, it was shown that it later issued a permit for the rebuilding of the bulkhead at a location further beyond the line. At the time of the dredging, the bulkhead structure was, therefore,

legally and properly in place, and the destruction thereof, which accompanied the sliding of the land into the canal, is a part of the damage caused by the taking, and properly the subject of claim on the part of the owner.

IV.

Constructive Taking.

It is a well established principle in the law that one whose property has been injured or taken away from him by some tortious act may waive the tort and sue on contract for the value of the property taken. The Court of Claims, though having upon a particular state of facts, no jurisdiction to entertain an action sounding in tort, may under this principle entertain an action upon an implied promise by the Government to pay the value of the property taken and any consequential damage resulting from the taking. The Government is liable in the same manner as it would be if it had exercised its right of eminent domain and acquired the property by condemnation proceedings. In other words, the Court recognizes a constructive taking of the property and makes an award accordingly.

The above principle has been applied wherever there is a permanent flooding or destruction of property in the course of the Government's work of improving navigable waters. In a leading case (*U. S. v. Lynah*, 188 U. S. 445) Justice Brewer says:

“The government does not, in a sense, take this land for the purpose of putting its obstructions on it, but it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the government, that water in the river must be raised. The banks of this plantation materially assist

this operation, for by their assistance, the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking."

Mr. Justice Pitney, in a later case involving the overflow of lands (*U. S. v. Cress*, 243 U. S. 326) says:

"The authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like all others, must be exercised when private property is taken in subordination to the Fifth Amendment * * * where the government, by construction of a dam or other public works, so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment * * * Such of the properties * * * as were unaffected by the flows of the rivers and their tributaries prior to the construction of locks and dams in question were private property and not subject to be overflowed without compensation."

In the case at bar, property of the plaintiff was destroyed and its lands overflowed by the water of the canal as a result, not of the raising of the level of the waters of the canal, but of the lowering of the bottom of the canal to comply with the depth specified in the Act of Congress authorizing the work. In principle, the cases are the same. The dredging close to the plaintiff's property line caused his property to be undermined by the outward flow of the silt and mud of which the subsoil was largely composed, with the result that the bulkhead and dock collapsed and the land protected by the bulkhead sank to a point where a substantial part of it became submerged under the spreading waters of the canal. Such destruction of the plaintiff's property and the overflowing of his lands were clearly a taking.

V.

"Taking" in the Legal Sense Means Taking Away or Depriving a Party of a Thing.

The word "taking" as used in relation to eminent domain, has long been recognized as embracing not only property acquired, for public use, but also property destroyed by the taking authority. It is immaterial whether the power which takes it away acquires the thing or whether it destroys it. In either case, it is equally a taking, and just compensation must be made.

The court, in its opinion, emphasizes the fact that, in the dredging operations the Government "did not in any way encroach upon the property" or "exceed the authorized and legal dimensions of the waterway" (R. 17) and states: "From the foregoing, it is clear that the defendant did not in any way encroach upon any property rights of plaintiff and under the facts disclosed, there is no justification for the application of the principle of a constructive taking" (R. 18).

This fallacious argument as to the scope of the word "take," namely, that it implies some actual physical encroachment or entry upon the property "taken" was advanced in a case where a corporation was given the right to construct a dam. Though the dam was constructed exactly in accordance with the statute, the water overflowed plaintiff's land. The statute made no provision for compensation in such contingency. But it was held that the injury to plaintiff's property was within the protection of the constitution—and Justice Miller says:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commenda-

tion of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." (*Pumpelly v. Green Bay Company*, 13 Wall. 166, at p. 177.)

The courts have with a high degree of uniformity recognized and applied the principles so strongly expressed by Justice Miller, as the following cases show:

- U. S. v. Grizzard*, 219 U. S. 180;
- U. S. v. Welch*, 217 U. S. 333;
- U. S. v. Great Falls Manufacturing Company*, 112 U. S. 645 p. 656;
- Hollister v. Benedict Manufacturing Co.*, 113 U. S. 59;
- U. S. v. Palmer*, 128 U. S. 262;
- Stephenson Brick Co. v. U. S.*, 110 F. 2d 360;
- Schufelbein v. U. S.*, 124 F. 2d 945;
- Tompkins v. U. S.*, 45 Ct. Cl. 66;
- U. S. v. Chicago, etc. R. R. Co.*, 113 F. 2d 219.

In *U. S. v. Grizzard* (219 U. S. 180) a narrow strip only, of a large farm was overflowed. The difference in the value of the farm before the overflow and after was allowed.

In *U. S. v. Walls* (44 Ct. Cl. 482) only 2 3/10 acres from

a large tract were overflowed and rendered useless, for which portion compensation was given.

In *Stephenson Brick Co. v. U. S.* (110 F. (2d) 360) where a small portion of a brick yard was overflowed, the court says:

“The owner is entitled to be compensated, not only for the separate value of the land taken, but also for the loss in value of the remainder of the tract in the use that was made of it at the time of the taking * * * the fair value at the date of the taking, of the whole plant, excluding personal property ought to be ascertained, looking upon it as a plant organized for a business shown to be genuinely successful and having a good profit, and also the fair value of what was left afterward. The difference in value is the just compensation to be paid.”

In *Hood v. U. S.* (41 Ct. Cl. 30) only a one-half acre of plaintiff's seventy acres was overflowed. The court says:

“The permanent submerging of the quantity of land shown by the findings is such a taking as renders the Government liable.”

In *United States v. Chicago, etc. R. R. Co.* (113 F. (2d) 919, 925) the plaintiff's structures were located on the lands between high and low water lines, to which plaintiff held title, subject, of course, to the paramount right of the United States over navigable streams. As a result of work done in other parts of the river, the water was raised to a level above ordinary high water and it was held the Government had converted a navigable stream into an artificial canal to the extent of the raising of the water level, and that:

“The flooding of the appellees' property, here involved, above ordinary high water mark, was a taking of their property for which they are entitled to compensation.”

VI.

As to Obligation of Plaintiff to Protect Against Damage From the Dredging.

The court concluded Special Finding of Fact No. 9 with what is obviously a conclusion of law, namely:

“The plaintiff’s damages were indirect and consequential due to its failure to maintain an adequate bulkhead and to its neglect to install sufficient foundations for its coal pockets, derrick, and other shore equipment” (R. 13).

This implies an obligation as a matter of law on the plaintiff’s part to protect his property against the effects of the dredging, and is obviously based upon the erroneous premise of fact assumed, without warrant, that the Government in acquiring title acquired marginal rights, subject to which the plaintiff acquired the property. In fact, in the opinion, it is stated:

“The plaintiff acquired the property subject to the undeniable rights of the United States to maintain a navigable waterway at the authorized depth and width.”

and again

“When plaintiff acquired the property, it acquired it subject to the existing rights of the United States, and plaintiff did not acquire any right to prevent the United States from properly maintaining the navigable waterway or to compel it to answer for any damage that might result from collapse of the bulkhead by reason of proper maintenance of the waterway by the defendant” (R. 18).

There are no facts in the findings or in the record anywhere which support the above statements that any rights in or over the Roden Coal Company property existed in

favor of the United States, to which the property was subject from the time of the condemnation of the adjoining strip in 1886 down to the present date.

Yet unless the facts show that such rights existed, the decision arrived at cannot be upheld, for it is unequivocally based upon the theory that the property damaged was subject to said rights and that therefore, if in the exercise of such rights, damage resulted to the property, it was indirect and consequential to the exercise by the defendant of a lawful power.

It is clear beyond question that, unless the plaintiff *did* acquire the property subject to the rights which the Court assumed existed in favor of the United States, then there was no obligation on its part to protect against damage which might result from the dredging. It was in the position of an owner of the full fee and as such enjoyed the rights attached to such ownership.

When the United States, to complete the work provided to be done by Congress, dredged the channel for the canal in front of the plaintiff's land, thereby causing the plaintiff's dock structure, coal pockets, etc., to collapse and the plaintiff's land to slide into the canal excavation and the waters of the canal to overflow same, it was not exercising any paramount right over a navigable stream to improve navigation.

It was acting deliberately to dredge to the required depth a canal directed to be constructed by an Act of Congress. It knew, or at least is chargeable with knowledge, because of previous experience, that the soil was of such a character that it would not support itself alongside a vertical cut of the depth required, and that it must be artificially supported to prevent damage—a burden the expense of which it could not shift on to the shoulders of the adjoining owner. In this respect the United States stood in a position no

different from a private owner. The old common law rule has been expressed as follows:

“I have a natural right to the use of my land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots, and the owners of these lots will not be permitted to destroy my land by removing this natural support or barrier.” (Riley *v.* Continuous Rail Joint Co., 110 Appellate Division 787, 789.)

This principle has been generally embodied in the statute law. In New York State it is expressed in Chapter 929 of the 1937 laws of New York (known as the Administrative Code).

Article 9, Sub-article 2, Section C. 26-384.0.

“Excavations affecting adjoining property.—a—Temporary support of adjoining property. Any person causing any excavation to be made shall provide such sheet piling and bracing as may be necessary to prevent the earth of adjoining property from caving in before permanent supports have been provided for the sides of such excavation. b—Permanent support of adjoining property.—Whenever provisions are lacking for the permanent support of the sides of an excavation in accordance with the provisions of Section C26-563.0, a person causing such excavation to be made shall build a retaining wall at his own expense and on his own land. Such retaining wall shall be carried to a height sufficient to retain the adjoining earth, shall be properly coped and shall be provided with a substantial guard rail or fence four feet high.

C26-385.0. Excavations affecting adjoining structures—*a*—Excavations more than ten feet deep.—Whenever an excavation is carried to a depth of more than ten feet below the curb, the person who causes such excavation to be made shall, if afforded the license necessary to enter the adjoining premises, at all times and at his own expense preserve and protect from in-

jury any structure the safety of which may be affected by such part of the excavation as extends more than ten feet below the curb, and such person shall support the adjoining structure by proper foundations, whether or not such structure is more than ten feet below the curb."

It is to be noted that the dredging which caused the damage was below the 10 foot depth. No question can be raised as to the responsibility being limited to the land as distinguished from the structures. Unless by some legerdemain the United States acquired a right to override the ordinary principles of private ownership as to which we find no evidence, it was responsible for the ordinary and natural consequences of its acts in the use of the land acquired by condemnation.

It had no more right to excavate the land to the damage of adjoining lands than a private owner. In fact, for the purpose of the use of the strip acquired, it *was* a private owner.

People ex rel. Western N. Y., etc., R. R. Co. v. State Tax Commissioner, 244 N. Y. 596, 597;
Morgan v. King, 35 N. Y. 453, 457.

The unfortunate mistake made by the Court in proceeding upon the theory that marginal rights were acquired by the United States with the title, and that, accordingly, the plaintiff must have owned the land subject to such existing rights, makes it imperative, if justice is to be done, that said mistake be corrected. If the Special Findings of Fact are silent or are ambiguous as to this point, then justice requires that the case be remanded for definite finding. If, however, as we claim, there is no warrant in the facts found or in the record anywhere for the mistaken conclusion, then the judgment should be ~~revised~~ and judgment directed for the plaintiff. *reversed*

VII.

Findings of Fact Ambiguous and Contradictory.

Certain facts were assumed by the Court as true and were directly referred to as grounds for its conclusion of law, although the Findings of Fact with respect thereto were ambiguous and contradictory.

These facts were:

(a) That the defendant had no reason to expect the damage would follow the dredging (R. 13, F. 9).

(b) That the defendant did not use, occupy, invade, or encroach upon plaintiff's land (R. 13, F. 9).

(a) is definitely contradicted by Finding 5, which finds: "By the year 1937, it was apparent that dredging close to plaintiff's bulkhead would place the coal yard in danger of subsidence through failure of the bulkhead piling to hold."

(b) is inconsistent with the definite statement in Finding 6 that "the dredging did in fact cause a subsidence of plaintiff's coal yard and disintegration of the wooden portion of the bulkhead and cribbing back of the bulkhead to such an extent as materially to damage the coal yard and make useless a substantial part thereof. * * * exposing a portion of the coal yard to flooding and erosion of high tides."

The words "invade" and "encroach" do not imply physical entry by the defendant and its agents, but are broad enough to include acts which result in destruction of and damage to property which have uniformly been recognized as amounting to a taking, in the cases cited in the earlier part of this brief.

The contradictory and ambiguous findings above referred to, coupled with the absence of definite findings as to the existence of marginal rights in favor of the United

States (see petition, p. 7 and II and VI, *ante*) did not warrant the assumption by the Court of the facts upon which it rested its conclusion of law.

The judgment should be reversed and the case remanded for definite findings.

Luckenbach v. U. S., 272 U. S. 533, 539;
U. S. v. Adams, 6 Wall. 101, 111-112;
U. S. v. Clarke, 96 U. S. 37, 39.

VIII.

Conclusion.

The Roden Coal Company, an active successful business concern, has been suddenly put out of business and brought to the verge of financial ruin.

The disaster results directly from the acts of the Government in proceeding with the dredging of an artificial waterway close to the line of the Coal Company's land.

The dredging was proceeded with on November 1, 1937, after an express warning by the Coal Company's president to the United States engineer in charge, that damage would follow. Experience with prior dredgings also had made it "apparent that dredging close to plaintiff's bulkhead would place the coal yard in danger of subsidence through failure of the bulkhead piling to hold."

The engineer in charge on the morning of November 3 discovered signs of subsidence and moved the dredge away from the bulkhead out into the stream, but it was too late. Subsidence of the land continued, disintegration of the bulkhead proceeded; the land and bulkhead slid down into the waterway "exposing a portion of the coal yard to flooding and erosion of high tides"; destruction occurred to "such an extent as materially to damage the coal yard and make useless a substantial part thereof."

The United States neither had nor ever claimed any slope rights or other rights over the Coal Company's land.

In this suit, the Attorney General set up no such defense. The Special Findings of Fact contain no finding as to such rights. The Court of Claims, however, proceeded as though such rights existed, and the opinion states that the United States obtained title from the owners "including any rights adjacent to the actual dimensions of the navigable channel that might be affected by construction of the navigable waterway."

If there be doubt as to whether such rights were acquired, the petitioner asks that the case be remanded for a definite finding on this point. If, however, upon the findings as made, this Court is satisfied that no such rights were acquired, then upon review the judgment should be reversed, since only upon the ground of the existence of such rights can the judgment be justified.

If the Court shall decide to remand the case for a definite finding as to the said rights, in so far as the findings, which have been hereinabove noted as contradictory, may be deemed to have contributed to the erroneous conclusion reached, they should be corrected.

Respectfully submitted,

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Petitioner Roden Coal Company.*

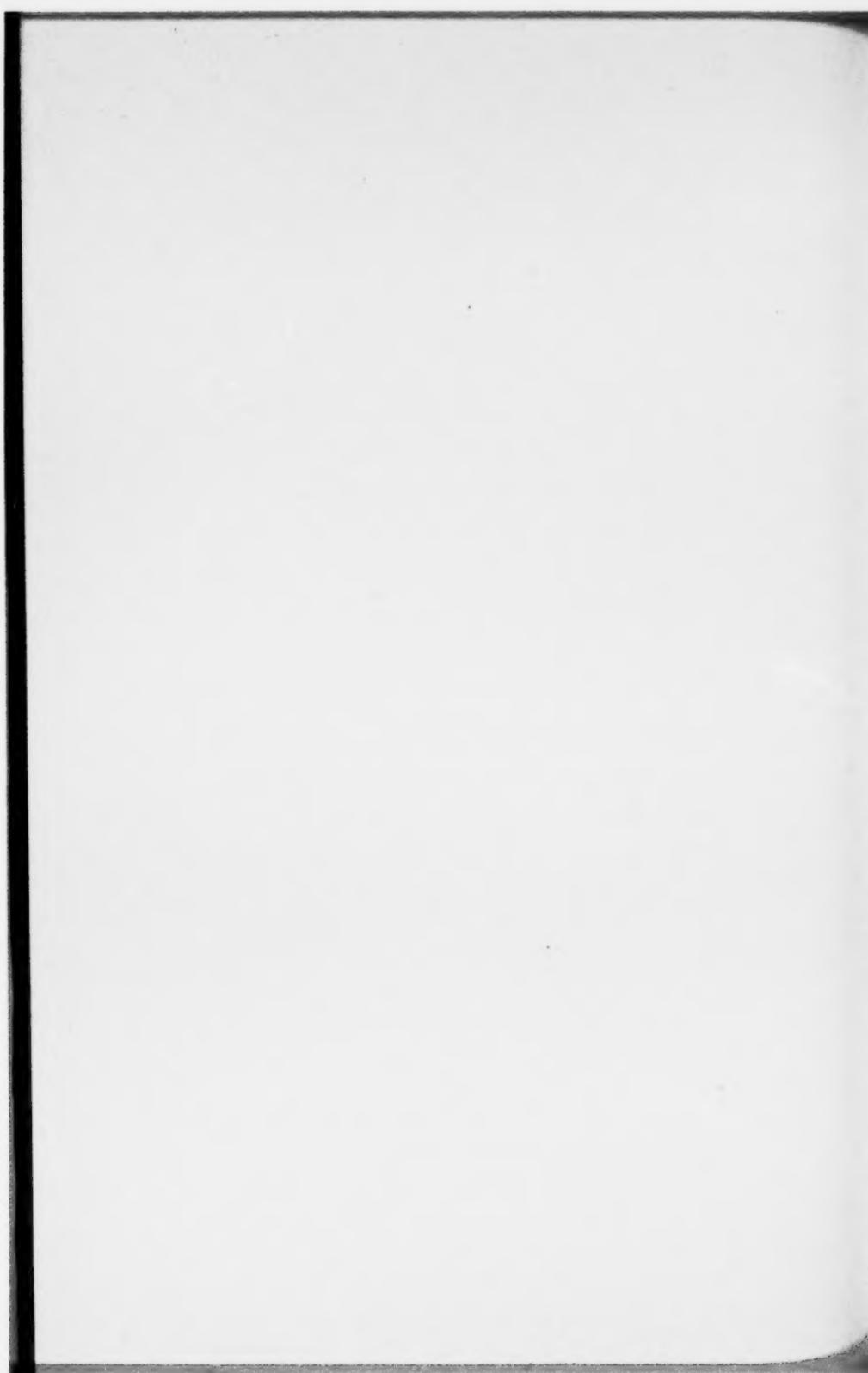
Dated May 12, 1942.





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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 90

RODEN COAL COMPANY, INCORPORATED, PETITIONER

v.

THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 14-19) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered December 1, 1941 (R. 19). Motions for a new trial were overruled February 2, 1942 (R. 20). The time within which to file a petition for writ of certiorari was extended to and including May 20, 1942, by order of the Chief Justice (R. 20). The petition for writ of certiorari was filed May 16, 1942 (R. 20). Jurisdiction of this Court is invoked under section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

The Government condemned land for use in creating a navigable canal. Thereafter the canal was kept dredged to a depth not exceeding the authorized project dimensions and the reasonable needs of navigation. Land adjacent to the canal, on which heavy structures had been constructed, subsided, and this property suffered substantial damage. The question is whether the Government is obligated to compensate the landowner for the damage.

STATEMENT

Petitioner, a New York corporation, engaged in the retail coal business, in 1933 acquired a tract of land on the Harlem River having an area of approximately 44,388 square feet (R. 9). The tract was used by petitioner as a coal yard with hoists, coal pockets, scales, offices, bins, cranes, a screening plant, and other facilities appertaining to a coal yard (R. 9-10). Coal was received at the water front from barges and was retailed to customers by truck (R. 10).

The water course known as the Harlem River, which separates Manhattan Island from the mainland, formerly consisted of the Harlem River and Spuyten Duyvil Creek (R. 10). The desirability of improving this waterway was under consideration in 1873 but Congress would not authorize the expenditure of money appropriated for improving the waterway until certain land had been acquired

free of cost to cut a canal across Dyckman's Meadows, in this way avoiding a round-about loop formed in the then existing waterway (R. 10). By 1887 the land necessary to cut a canal across Dyckman's Meadows was obtained by the United States without expense and the cut was completed in 1895 (R. 10).¹

The project adopted by Congress provided for a channel through Dyckman's Meadows 18 feet in depth and 350 feet in width (R. 10). In 1907 a channel 15 feet deep and 150 feet wide was dredged which passed the frontage of the site of land now owned by petitioner (R. 10). The property now owned by petitioner has fronted on a navigable artificial waterway since completion of the cutoff in 1895 (R. 11) and the channel in front of petitioner's property has been maintained at a minimum depth of fifteen feet since 1907 by intermittent dredging (R. 11). The waterway in the general vicinity of the property was dredged in 1926 and in 1929-1930 (R. 11). There had been some settlement of the land following the dredging

¹ The land was secured in condemnation proceedings pursuant to New York statutes which authorized the United States to take so much of the land as might be necessary for the location, construction, and convenient use of the contemplated project. The cost of the proceedings, as well as the cost of the land acquired, was defrayed by assessments against contiguous landowners whose properties were increased in value by the improvements undertaken. N. Y. Laws, 1876, c. 147; N. Y. Laws, 1879, c. 345; N. Y. Laws, 1880, c. 65; N. Y. Laws, 1881, c. 61.

operations of 1926, and after the dredging operations of 1929-1930 it was necessary to repair the bulkheads (R. 12), permission being obtained from the War Department by petitioner's predecessor in title to place sheet-steel piling along the face of the existing bulkhead (further encroaching on a water-front line established by the Secretary of War on October 18, 1920, from two feet seven inches to three feet) (R. 11).

In 1937 the United States commenced dredging operations close to petitioner's bulkhead (R. 11). Petitioner's president communicated with the engineer in charge and stated that he feared that the dredging would damage petitioner's bulkhead (R. 11). On November 3 the Government engineer discovered a crack in petitioner's land (R. 11-12), and thereupon the dredge was removed to a position midstream from which it worked gradually shoreward toward the bulkhead (R. 12). On November 18, 1937, it was discovered that the earth shoreward of the bulkhead had settled about one foot and petitioner was endeavoring to prevent further inclination channelward of the bulkhead by the use of steel tie rods (R. 12). Thereupon dredging operations in the vicinity of petitioner's bulkhead were discontinued (R. 12). No dredging in front of petitioner's property ever exceeded the authorized project dimensions or the reasonable needs of navigation (R. 12).

The dredging weakened the foundation support of the bulkhead piling, resulting in subsidence of

petitioner's coal yard and disintegration of the wooden portion of the bulkhead to such an extent as materially to damage the coal yard and to make useless a substantial part of the yard (R. 12). The bulkhead was of insufficient depth below the bottom of the river and of insufficient strength to withstand loss of material at its base (R. 12), and the court below found that petitioner's damages were due to its failure to maintain an adequate bulkhead and to its neglect to install adequate foundations for its coal pockets, derrick, and other heavy shore equipment (R. 13). The fair and reasonable cost of repairing petitioner's property was \$45,044, and the market value of petitioner's property was diminished in value by the amount of \$89,162 as a result of the subsidence of its bulkhead and land.

In 1938 petitioner brought suit in the Court of Claims against the United States.² The court, after entering findings of fact, which have been summarized above, concluded that the United States had acquired all rights necessary to the construction and maintenance of the canal (R. 15) and that any damage to petitioner's property to which the

² On October 11, 1941, the receiver of the First National Bank and Trust Company of Yonkers, New York, filed an intervening petition alleging that as mortgagee it was justly entitled to any award made (R. 5-7). The United States filed a general traverse to this intervening petition (R. 7), and petitioner denied that the claim of the intervening receiver was one which could be settled in the pending action (R. 7-8). The disposition which the court below made of the case rendered it unnecessary for it to adjudicate the claim of the receiver.

dredging operations might have contributed was indirect and consequential. The court accordingly entered judgment dismissing the petition.

ARGUMENT

Petitioner contends that in the condemnation proceeding the United States acquired no marginal or slope rights in the lands adjacent to the canal (Pet. 15-17), and that the subsidence of the land into the canal was a taking of its property obligating the United States to pay just compensation therefor (Pet. 19-20). The court below held that the petitioner acquired the property subject to the existing right of the United States to maintain the canal at the authorized depth and width, and that the damage to petitioner's property by reason of its collapse was consequential to the exercise of a lawful power by the Government. The decision below is correct, and the case presents no question requiring review by this Court.

1. Petitioner's land was used as a coal yard on which were erected hoists, coal pockets, scales, offices, cranes, a screening plant, and other apparatus (R. 9-10). As the Court of Claims pointed out, these "large facilities greatly increased the load which the bulkhead had to bear" (R. 16) and petitioner's damages were due to its failure to maintain an adequate bulkhead and its neglect to install sufficient foundations for its coal pockets, derricks, and other heavy shore equipment (R. 13). In these circumstances, the Government was plainly

under no duty to afford lateral support, for it is settled doctrine that the obligation to provide lateral support to adjacent land is limited to land in its natural condition and does not extend to land on which improvements have been erected. *Transportation Co. v. Chicago*, 99 U. S. 635, 645.³

2. Moreover, any right of lateral support which the adjacent landowners may have had was acquired by the Government in the condemnation proceedings. The Government in 1886 condemned the land bordering on petitioner's waterfront for use in creating the canal (R. 11) and, as the court below concluded, "obtained from the then owners of the property involved in this suit title to such property and property rights as were necessary to the construction and maintenance of the canal * * *,"

³ This rule prevailed in New York at the time the United States acquired title to the condemned land. *Riley v. Continuous Rail Joint Co.*, 110 App. Div. 787, aff'd 193 N. Y. 643; *Bergen v. Morton Amusement Co.*, 178 App. Div. 400, aff'd 226 N. Y. 665. The New York statutes cited by petitioner (Pet. 26-27) are not effective to impose additional obligations on the United States. One statute (New York Laws, 1937, c. 929, Art. 9, sub-art. 2, Section C26-384.0) refers only to support for adjacent "earth." The other (New York Laws, 1937, c. 929, Art. 9, sub-art. 2, Section C26-385.0) refers to excavations below the "curb" and it is doubtful if the statute applies at all to dredging for canal purposes. Moreover, the United States acquired the land free from the obligation of providing support for adjacent land on which heavy facilities had been or would be erected, and the State of New York cannot subsequently impose additional obligations or burdens on the United States in the performance of its governmental functions. *Arizona v. California*, 283 U. S. 423, 451; *Hunt v. United States*, 278 U. S. 96; *Johnson v. Maryland*, 254 U. S. 51.

including any rights adjacent to the actual dimensions of the navigable channel that might be affected by construction of the navigable waterway" (R. 15). Cf. *United States v. Cress*, 243 U. S. 316, 329. Any rights of petitioner's predecessors in interest should have been and presumably were asserted in the condemnation proceedings. *United States v. Chicago, B. & Q. R. R.*, 82 F. (2d) 131, 136 (C. C. A. 8) certiorari denied, 298 U. S. 689; cf. *United States v. River Rouge Co.*, 269 U. S. 411, 418-419; *United States v. Grizzard*, 219 U. S. 180; *Sharp v. United States*, 191 U. S. 341; see Orgel, *Valuation under Eminent Domain*, 199, note 88; Nichols, *Eminent Domain* (2d ed. 1917), 1360-1361, 1240, and cases cited. The dredging in front of petitioner's property has never exceeded the authorized project dimensions or the reasonable needs of navigation (R. 12).⁴

⁴ The decision below may be supported on an independent ground. The federal statutes authorizing the project to be undertaken by the United States (Act of June 18, 1878, c. 264, 20 Stat. 158; Act of March 3, 1879, c. 186, 20 Stat. 372) expressly provided that the money appropriated for the project was "not to be available until the right of way is secured to the United States free of cost", and Congress consistently adhered to this position in subsequent legislation. Act of March 4, 1913, c. 144, 37 Stat. 803. Since any acquisition at expense to the Government was forbidden, the taking of petitioner's easement of support was unauthorized if, as petitioner contends, the taking involved an obligation to make compensation and, therefore, affords no basis of recovery. *Hughes v. United States*, 230 U. S. 24; cf. *Hooe v. United States*, 218 U. S. 322, 334; see *United States v. North American Co.*, 253 U. S. 330, 333.

CONCLUSION

The decision of the Court of Claims is correct. There is no conflict of decisions, and the case presents no question requiring review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1942.